FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-49
No. 90-117

In The

Supreme Court of the United States

October Term, 1990

MISSOURI PACIFIC RAILROAD COMPANY,

Defendant-Petitioner,

and

LELAND L. LOCKARD AND LYNETTE LOCKARD,

Plaintiffs-Petitioners,

v.

ROSELLA RAY d/b/a
ROSELLA RAY'S BOARDING HOUSE,

Defendant-Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI FILED BY LELAND L. LOCKARD AND LYNETTE LOCKARD, AND MISSOURI PACIFIC RAILROAD COMPANY

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QUESTION PRESENTED

Whether this Court should review the decision below holding that pendent-party jurisdiction is not authorized or permitted by the Federal Employers' Liability Act.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities ..... iii-iv

Statement of the Case 1

Argument 1

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

Ezell v. Burlington Northern Railroad Co., 724 F.Supp. 863 (D. Wyo. 1989) 7, 9, 10

Finley v. United States, 109 S.Ct. 2003 (1989) ..... *passim*

Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir.) *cert. denied*, 58 U.S.L.W. 3835 (June 28, 1990) 4

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 43 S.Ct. 422 (1923) 2

Lee v. Transportation Communications Union, 734 F.Supp. 578 (E.D.N.Y 1990) 5, 7, 8, 10

Lockard v. Missouri Pacific Railroad Co., 894 F.2d 299 (8th Cir. 1990) 3, 6, 7, 8

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614 (1955) 1, 2, 10

Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292 (2d Cir. 1990) 3, 4, 5, 8

Rodriguez v. Comas, 888 F.2d 899 (1st Cir. 1989) 5, 6

Silcox v. CSX Transportation, Inc., 731 F.Supp. 503 (N.D. Ga. 1990) 9, 10

Staffer v. Bouchard Transportation Co., 878 F.2d 638 (2d Cir. 1989) 5

Stallworth v. City of Cleveland, 893 F.2d 830 (6th Cir. 1990) 4, 5, 6

Teledyne, Inc. v. Kone Corp., 892 F.2d 1404 (9th Cir. 1989) 4, 5

TABLE OF AUTHORITIES – Continued

Page

Tersiner v. Union Pacific Railroad Co., 1990 WL 92813 (D. Kan. June 7, 1990) 9

STATUTES

28 U.S.C. § 1330 6

28 U.S.C. § 1346(b) 2

29 U.S.C. § 1132(e) 6

42 U.S.C. § 1983 6

45 U.S.C. § 51 ..... 7, 9

45 U.S.C. § 56 ..... 7, 9

STATEMENT OF THE CASE

Defendant-Respondent, Rosella Ray d/b/a Rosella Ray's Boarding House ("Rosella Ray"), submits this brief in opposition to the separate petitions for writ of certiorari filed by Plaintiffs-Petitioners, Leland L. Lockard and Lynette Lockard ("Lockard"), and by Defendant-Petitioner, Missouri Pacific Railroad Company ("MoPac"). Other than the argument contained in MoPac's Statement of the Case, Rosella Ray has no objection to the statements in the respective petitions for writ of certiorari.

ARGUMENT

I. **THE EIGHTH CIRCUIT COURT OF APPEALS DECISION ON THE ISSUE OF PENDENT-PARTY JURISDICTION IN FELA CASES DOES NOT PRESENT "SPECIAL AND IMPORTANT REASONS" SO AS TO REQUIRE REVIEW BY THIS COURT.**

II. ***FINLEY V. UNITED STATES*, 109 S. CT. 2003 (1989), RESOLVES THE ISSUE OF PENDENT-PARTY JURISDICTION IN FELA CASES WITH A CLEAR RULE OF STATUTORY INTERPRETATION, A RULE WHICH IS BEING APPLIED IN VARIOUS CONTEXTS BY LOWER FEDERAL COURTS.**

Pursuant to Supreme Court Rule 10.1, "A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Special and important reasons "imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955). In the words of Chief Justice William Howard Taft:

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance in the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 423 (1923), quoted in *Rice, supra*, 349 U.S. at 79, 75 S.Ct. at 619-20.

The present case "comes under neither head." *Layne & Bowler, supra.* Any differences in language or result among the Circuit Courts of Appeal which have applied *Finley v. United States*, 109 S.Ct. 2003 (1989), to various statutory schemes, do not by any stretch of imagination amount to "a real and embarrassing conflict of opinion and authority." *Rice*, 349 U.S. at 79, 75 S.Ct. at 620. The petitions for certiorari filed by Lockard and MoPac should therefore be denied.

In *Finley*, this Court held that pendent-party jurisdiction is not available in actions brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). 109 S.Ct. at 2010. The Court began its analysis by noting that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly." 109 S.Ct. at 2007. Employing a restrictive reading of pendent-party jurisdiction, the *Finley* Court determined that factual similarity and judicial economy alone are insufficient to warrant the assertion of jurisdiction over state

law claims involving additional parties without an independent basis for jurisdiction. *Id.* at 2008.

Under *Finley*, pendent-party jurisdiction does not exist by virtue of the fact that Congress has failed to negate it. *Lockard v. Missouri Pacific Railroad Co.*, 894 F.2d 299, 301 (8th Cir. 1990) (the case below); *see* cases cited at n.2, *infra*. Rather, "pendent-party jurisdiction is available only if the statute providing federal jurisdiction over the primary claim can also be interpreted as specifically conferring jurisdiction over other claims against additional parties." *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292, 1295 (2d Cir. 1990).

This Court concluded its holding in *Finley* by stating:

> . . . *Aldinger* indicated that the *Gibbs* approach would not be extended to the pendent-party field, and we decide today to retain that line. . . . What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts. *All our cases – Zahn, Aldinger, and Kroger – have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.* Our decision today reaffirms that interpretive rule; the opposite would sow confusion.

109 S.Ct. at 2010 (emphasis supplied).

It is submitted that *Finley* sets forth "a clear rule of statutory interpretation"[1] to be applied in pendent-party cases. Pendent-party jurisdiction is available only when the primary claim is brought under a federal statute

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[1] *Lockard*, 894 F.2d at 301.

affirmatively granting such jurisdiction. *See Finley*, 109 S.Ct. at 2009.

In its petition for writ of certiorari, MoPac argues that this Court's decision in *Finley* has generated "enormous confusion" and "widespread uncertainty" in the Circuits concerning the doctrine of pendent-party jurisdiction in federal question cases. MoPac further claims to have identified "at least four different views concerning the impact of *Finley* on pendent-party jurisdiction." MoPac Petition at 7. Rosella Ray submits that any uncertainty or split of opinion in the Circuits concerning the proper scope of pendent-party jurisdiction after *Finley* is greatly overstated by Petitioners.

First, examination of the six appellate decisions cited by MoPac in support of its "judicial confusion" argument reveals that the courts in five of those cases clearly recognize that *Finley* restricted and narrowed the scope of the doctrine of pendent-party jurisdiction.[2] Such acknowledgment of *Finley's* strict rule of construction is significant in and of itself.

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[2] *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292, 1295 (2d Cir. 1990) (*Finley* Court "employ[ed] a restrictive reading of pendent-party jurisdiction"); *Stallworth v. City of Cleveland*, 893 F.2d 830, 837 (6th Cir. 1990) (Court in *Finley* "reaffirmed its unwillingness to apply pendent jurisdiction to parties"); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1409, 1410 (9th Cir. 1989) (*Finley* requires a close examination of statutory language; " . . . presumption against pendent-party jurisdiction" must be overcome); *Iron Workers Mid-South Pension Fund*

(Continued on following page)

Second, the critical factor in determining whether pendent-party jurisdiction may be exercised is the language of the particular statute conferring jurisdiction over the federal claim.[3] MoPac admits as much at page 12 of its petition for writ of certiorari. The different results reached by the Circuits on the issue of pendent-party jurisdiction after *Finley* reflect, in most instances, differences in the texts of the respective jurisdictional statutes involved. In *Roco Carriers*, the Second Circuit concluded that pendent-party jurisdiction is available "in the unique area of admiralty" due to the broadly worded jurisdictional statute, which creates jurisdiction over an entire admiralty "case" and contains no limitations as to a certain category of parties or of claims. 899 F.2d at 1296-97. The Court in *Teledyne* found that the plain language of the

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(Continued from previous page)

v. Terotechnology Corp., 891 F.2d 548, 551 (5th Cir.), *cert. denied*, 58 U.S.L.W. 3835 (June 28, 1990) (while pendent-party jurisdiction "may pass constitutional muster, it has not been congressionally authorized"); *Staffer v. Bouchard Transportation Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989) (after *Finley*, "pendent-party jurisdiction apparently is no longer a viable concept"). In the sixth decision, *Rodriguez v. Comas*, 888 F.2d 899, 903 n.18, 905-06 (1st Cir. 1989), the First Circuit acknowledged *Finley* but held that the factors of "posture" or "context" and the text of the federal jurisdictional statute at issue were significantly different than in *Finley*, and " . . . lead here to the conclusion that pendent jurisdiction properly may be exercised." The *Rodriguez* court pointedly noted that "when federal courts are not the exclusive forum, courts generally deny attempts to add defendants as pendent parties." 888 F.2d at 903.

[3] *Roco Carriers*, 899 F.2d at 1296 (" . . . most important for the analysis under *Finley* [is] the language of the relevant statutory grants of jurisdiction . . . "); *Stallworth, supra*, 893 F.2d at 838; *Lee v. Transportation Communications Union*, 734 F.Supp. 578, 581 (E.D.N.Y. 1990); *see Finley*, 109 S.Ct. at 2007, 2008.

Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, which extends jurisdiction to "any civil action" against a foreign state, authorizes pendent-party jurisdiction. 892 F.2d at 1409-10. In *Iron Workers Pension Fund*, the Fifth Circuit held that the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(e), did not affirmatively confer jurisdiction over additional nondiverse parties, thus precluding the assertion of pendent-party jurisdiction over a state law claim to enforce a lien. 891 F.2d at 550-51. The First Circuit[4] and the Sixth Circuit[5] have come to opposing conclusions with respect to the availability of pendent-party jurisdiction in civil rights actions brought under 42 U.S.C. § 1983.

In sum, the uncertainty ascribed by MoPac to the Circuits concerning the proper interpretation of *Finley* is overstated and does not present a real and embarrassing conflict of authority. Courts applying the "clear rule"[6] set out by this Court in *Finley* to different statutory schemes of jurisdiction in divergent factual settings will necessarily arrive at conclusions which on their face may not seem consistent. Differences in emphasis and semantics among courts considering pendent-party issues are inevitable. The artificiality of petitioner MoPac's hypothesis that there are four or more distinct views concerning *Finley's* impact on pendent-party jurisdiction is readily apparent.

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[4] *Rodriguez*, 888 F.2d at 905-06.

[5] *Stallworth*, 893 F.2d at 837-38.

[6] *Lockard*, 894 F.2d at 301, 303.

Contrary to the assertions appearing in the petitions of Lockard and MoPac, this Court's decision in *Finley* did effectively resolve the propriety of pendent-party jurisdiction under the FELA.[7] The court below applied *Finley's* strict rule of construction to the FELA, and correctly held that the FELA's jurisdictional grant did not extend to pendent-party claims.[8] Perceiving no relevant difference in the breadth of the FELA's and FTCA's respective jurisdictional statutes, the *Lockard* panel reviewed the specific language of the FELA[9] and held:

> It is clear from this language that the FELA accomplishes in two steps what the FTCA accomplishes in one: a grant of jurisdiction over

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[7] *Lee v. Transportation Communications Union*, 734 F.Supp. 578, 581 (E.D.N.Y. 1990) (" . . . while the courts in this Circuit were split pre-*Finley* on whether pendent-party jurisdiction was available in an action brought under the FELA. . . . *Finley* has cast serious doubt as to the validity of such joinder"); *Silcox v. CSX Transportation, Inc.*, 731 F.Supp. 503, 504 (N.D. Ga. 1990) (*Finley* "controlled" claim of pendent-party jurisdiction against nondiverse party in FELA action, but *Finley* would not be applied retroactively "in view of the unique facts of this case"; *Ezell v. Burlington Northern Railroad Co.*, 724 F.Supp. 863, 865 (D.Wyo. 1989) (applying the *Finley* analysis to the language of 45 U.S.C. § 51, court concluded that it was not permitted to exercise pendent-party jurisdiction over the employee's state claim defendants).

[8] *Lockard*, 894 F.2d at 302-03.

[9] 45 U.S.C. § 51 imposes liability on "[e]very common carrier by railroad" for injuries sustained by railroad employees. 45 U.S.C. § 56 provides that "[u]nder this chapter an action may be brought in a district court of the United States, . . . "

> claims involving particular parties, in this case FELA claims against railroads. Therefore, *Finley's* holding that such a jurisdictional grant "does not itself confer jurisdiction over additional claims by or against different parties," 109 S.Ct. at 2006, is equally applicable under the FELA.

894 F.2d at 302.

This determination is supported by the Second Circuit, which in confirming the availability of pendent-party jurisdiction "in the unique area of admiralty," concluded that "[t]he admiralty jurisdictional statute does not contain a limitation as to a certain category of parties, *as does the FTCA and the FELA.*"[10]

Rosella Ray acknowledges that, prior to *Finley*, the lower federal courts were divided on the question of whether the exercise of pendent-party jurisdiction was permissible in an action brought under the FELA.[11] A brief examination of the post-*Finley* district court decisions addressing the pendent-party jurisdiction issue, however, suggests that the pre-*Finley* split of authority is resolving itself.

In *Lee v. Transportation Communications Union*, 734 F.Supp. 578 (E.D.N.Y. 1990), the court held that a railroad employee may not assert pendent-party jurisdiction over a co-employee based on state law tort claims in an action

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[10] *Roco Carriers*, 899 F.2d at 1296, 1297 (emphasis supplied).

[11] *See Lockard*, 894 F.2d at 301, and cases collected at p.11, nn. 12, 13 and 14 of MoPac's petition for writ of certiorari.

commenced under the FELA, when no independent basis of federal jurisdiction exists:

> Accordingly, based upon the express language of the statute, and upon the persuasive authority of *Lockard* and the Second Circuit's recent *dicta* expression in *Roco Carriers*, this Court is of the view that pendent-party jurisdiction is unavailable in actions brought under the FELA.

734 F.Supp. at 582.

Similarly, the district courts in *Silcox v. CSX Transportation, Inc.*, 731 F.Supp. 503 (N.D. Ga. 1990)[12] and *Ezell v. Burlington Northern Railroad Co.*, 724 F.Supp. 863 (D. Wyo. 1989),[13] each applied the *Finley* standard and concluded that the exercise of pendent-party jurisdiction was precluded in FELA cases since Congress did not affirmatively grant such jurisdiction in 45 U.S.C. § 51 or 45 U.S.C. § 56. The sole decision[14] upholding the applicability of pendent-party jurisdiction to the FELA did not, inexplicably, discuss or even mention *Finley*. To Rosella Ray, this nearly uniform course of lower court opinions is compelling evidence indeed that *Finley* is being applied not to perpetuate, but rather to dissipate "prior judicial

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[12] The *Silcox* court expressed the view that an FELA action "presents an even stronger argument against pendent-party jurisdiction than was present in *Finley*" because Congress conferred upon state courts concurrent jurisdiction over FELA claims, so that a FELA plaintiff is not forced to file separate suits in state and federal court. 731 F.Supp. at 505.

[13] "The language of FELA clearly restricts the jurisdiction marked out by Congress to employee actions against common carriers by railroad." 724 F.Supp. at 865.

[14] *Tersiner v. Union Pacific Railroad Co.*, 1990 WL 92813 (D. Kan. June 7, 1990).

confusion concerning the correct resolution of pendent-party issues under the FELA."[15]

It may be recalled that the holding of the Eighth Circuit panel in the present matter by its terms applies only to actions brought pursuant to the FELA, not other federal statutes. The FELA "does not confer jurisdiction over a non-FELA claim, [so] there is no statutory basis for [a] court to apply the doctrine of pendent-party jurisdiction." *Silcox*, 731 F.Supp. at 505. Since the panel's holding is limited to the exercise of pendent-party jurisdiction in FELA actions and the FELA grants to both state and federal courts concurrent jurisdiction over FELA claims, this appeal does not raise any issues of exceptional public importance so as to justify further review. The Petitioners' resort to doomsday speculation as to the fate of pendent-party jurisdiction in general is inappropriate.

The jurisdictional issue in this FELA matter was properly decided by the Eighth Circuit panel, which correctly applied the standard set forth in *Finley*. There exists no real and embarrassing conflict of authority in the Circuits as to the impact of *Finley* on the doctrine of pendent-party jurisdiction, particularly in FELA actions, as evidenced by the recent district court decisions in *Lee, Silcox and Ezell*. While the question raised by Petitioners "may present an intellectually interesting and solid problem[,] . . . this Court does not sit to satisfy a scholarly interest in such issues."[16] Rosella Ray respectfully

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[15] MoPac's petition for writ of certiorari at 9.

[16] *Rice*, 349 U.S. at 74, 75 S.Ct. at 616.

submits that the instant case does not present "special and important reasons" warranting discretionary review by this Court.

CONCLUSION

For each and all of the reasons hereinbefore stated, the respective petitions of Lockard and MoPac for certiorari should be denied, and the writ should not issue.

Respectfully submitted,

ROSELLA RAY d/b/a ROSELLA RAY'S BOARDING HOUSE, Defendant-Respondent

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